ARREST – Arrest distinguished from *"Terry* stop and frisk"..... Revised 1/2010

An arrest requires probable cause**,** but not every seizure falling short of an arrest does. "To make an investigatory stop, however, the police need only have 'reasonable suspicion' that the suspect is engaged in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Rogers*, 186 Ariz. 508, 924 P.2d 1027 (1996)." *State v. Weinstein,* 190 Ariz. 306, 310, 947 P.2d 880, 884 (App. 1997). Reasonable suspicion must be based on specific articulable facts, along with rational inferences that arise from those facts. *Terry*, 329 U.S. at 21, 27, 88 S. Ct. at 1880, 1883; *In re Roy L.*, 197 Ariz. 441, 444-45, ¶ 8, 4 P.3d 984, 987-88 (App. 2000). Subjective good faith is not enough; the facts must be considered on an objective basis. The question is, "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Terry*, 329 U.S. at 21-22, 88 S.Ct. at 1880.

In *Terry*, the United States Supreme Court articulated the distinction between an arrest and an investigatory "stop and frisk":

> An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows. The protective search for weapons, on the other hand, constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person. It does not follow that because an officer may lawfully arrest a person only when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime, the officer is equally unjustified, absent that kind of evidence, in making any intrusions short of an arrest. Moreover, a perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime.

392 U.S. at 26-27, 88 S.Ct. at 1882-83.

There is no bright line rule to apply in determining when a lawful seizure based on reasonable suspicion becomes an arrest requiring probable cause; instead, the issue is determined based on "the approach of reason and common sense applied to the totality of the particular circumstances." *State v. Romero*, 178 Ariz. 45, 49, 870 P.2d 1141, 1145 (App. 1993). In *State v. Winegar*, 147 Ariz. 440, 711 P.2d 579 (1985), the Court reasoned that when the police stopped the defendant and her boyfriend on the street, they were "seized" under the Fourth Amendment because their freedom of movement was restricted. The police did not violate the Fourth Amendment by stopping them, but rather made a valid *Terry* stop because the police had reasonable suspicion -- although not probable cause -- to believe that they had committed murder and might be armed. The officers could also have frisked the defendant for weapons at the time of the stop. But the initially-valid *Terry* stop became an illegal arrest when the police moved the defendant across the street to the City Hall to question her, even though the police told the defendant that she was not under arrest. The Court noted that a *Terry* stop cannot continue beyond the minimum time necessary for the officers to briefly question the defendant.

> An arrest is complete when the suspect's liberty of movement is interrupted and restricted by the police. *State v. Green*, 111 Ariz. 444, 532 P.2d 506 (1975). Whether the defendant has been arrested is to be tested by the objective evidence and not by the subjective beliefs of the parties. *Id*. Thus, neither defendant's subjective belief that she was under arrest nor the police officer's impressions that defendant was free to go are relevant in making the arrest determination. Indeed, "[a] certain set of facts may constitute an arrest whether or not the officer intended to make an arrest and despite his disclaimer that an arrest occurred." *Taylor v. Arizona*, 471 F.2d 848, 851 (9th Cir. 1972).
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> The issue [of whether an arrest has occurred for purposes of the Fourth Amendment] turns upon an evaluation of all the surrounding circumstances to

> determine whether a reasonable person, innocent of any crime, would reasonably believe that he was being arrested.

Id. at 448, 711 P.2d at 587.

Significant factors in determining whether an arrest has occurred include “the officer's display of authority, the extent to which the defendant's freedom was curtailed, and the degree and manner of force used.” *State v. Acinelli*, 191 Ariz. 66, 69, 952 P.2d 304, 307 (App. 1997). In *State v. Ault,* although deputies had probable cause to arrest Ault at his home, they "chose not to legally arrest defendant at his home but requested that he accompany them to the police station." 150 Ariz. 459, 463, 724 P.2d 545, 549 (1986). Ault initially refused, but the deputies told him that "if he did not cooperate he would be arrested." The deputies then took Ault to the police station, where he was formally arrested. *Id*. at 462, 724 P.2d at 548. Even though the deputies stated that Ault was not arrested at his home, and even though the deputies used no force against him, the Arizona Supreme Court found that Ault was in fact arrested because when the deputies told him he would be arrested if he did not cooperate, "[n]o reasonable person would have believed that he was free to leave the scene at this point." *Id*. at 464, 724 P.2d at 550.

If the officer is acting to preserve his safety or that of the public, the mere use of force does not transform a stop into an arrest, nor does the use of a weapon. This is so even though the person stopped is cooperative with the police. In *State v. Blackmore,* 186 Ariz. 630, 925 P.2d 1347 (1996), an officer responded to a burglary call and the victims told him they heard someone leave their home through a window that led to an alley where they had seen an orange car parked. The officer went to the alley and found the defendant squatting by a dumpster; the officer then "drew his gun and ordered

defendant to lie on the ground, then handcuffed him, helped him to his feet, walked him to the patrol car, and searched him." *Id*. at 631, 925 P.2d at 1348. After searching him, the officer asked for identification; the defendant told him that his wallet was in a fanny pack in his orange car and consented to the officer's entering the car to get the fanny pack. When the officer opened the fanny pack, he found drugs, but nothing ever connected the defendant to the burglary. The Arizona Supreme Court held that the investigatory stop did not become a *de facto* arrest because the officer had good reason to suspect that a burglar and his parked car were in the alley and acted in a reasonably prudent manner "to detain defendant as if he were armed and dangerous." *Id*. at 634, 925 P.2d at 1351. Similarly, in *State v. Aguirre*, 130 Ariz. 54, 633 P.2d 1047 (App. 1981), the Court of Appeals found that the defendant was not under *de facto* arrest when, after he hid from police, the police handcuffed and detained him until they could get further evidence. In a third case, *State v. Clevidence*, 153 Ariz. 295, 736 P.2d 379 (App. 1987), the police stopped a car because they had information that an armed robbery suspect was a passenger in the car. Clevidence, the driver, had a "trucker's wallet" attached to his belt with a chain, from which he produced his driver's license. When he did so, the officer recognized Clevidence as a recently-released convict. Officers removed the two men from the car and found a gun under the passenger seat; they arrested the passenger and handcuffed and frisked Clevidence, finding no weapons. Clevidence then asked an officer to put his wallet back into his pocket; the officer agreed, but said he would first need to check the wallet for weapons. Clevidence made no comment and the officer felt the wallet, noted an unidentifiable bulge, and unzipped it, finding drugs and paraphernalia. On appeal, he argued that when the

officers handcuffed and searched him, it was an improper *de facto* arrest without probable cause. The Court of Appeals disagreed, finding that "[t]he fact that defendant was not free to leave does not, in and of itself, transform a valid investigatory detention into a traditional arrest with its probable cause requirement." *Id*. at 299, 736 P.2d at 383.